No. 99249-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ANTONIA NYMAN,

Respondents,

v.

DAN HANLEY AND ALL OTHER OCCUPANTS,

Appellant.

BRIEF OF *AMICUS CURIAE* RENTAL HOUSING ASSOCIATION OF WASHINGTON

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for *Amicus Curiae*
Rental Housing Association of Washington

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A. INTRODUCTION

Antonia Nyman correctly observes that "regardless of this Court's determination of whether the CDC's order on eviction moratoria ("CDC Order") is constitutional or whether it applies in Washington, it does not apply in matters where the reason for eviction is other than non-payment of rent." Resp't br. at 13. This is the only sensible reading of the of the CDC Order's plain language and its subsequent guidance. Because Nyman sought to reoccupy her property as a primary residence, giving 60 days' notice after the lease expired, the CDC Order simply does not apply as the trial court properly determined.

But if this Court goes beyond this plain language to consider applying the CDC Order to preclude the unlawful detainer, the Rental Housing Association of Washington ("RHA") submits this brief to assist the Court in several respects. First, Washington courts disfavor federal preemption, and the CDC order does not preempt a more restrictive state moratorium on evictions, a field generally reserved to the states under their police powers. And second, should the Court adopt Dan Hanley's extreme interpretation of the CDC Order, it would amount to a taking of private property. This Court should avoid such a constitutional pitfall.

The Court should affirm the trial court's well-reasoned holding that the CDC Order does not prevent Nyman's unlawful detainer action from going forward.

B. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of RHA, as required by RAP 10.3(e), are explained in detail in their motion for leave to submit this *amici* brief.

C. STATEMENT OF THE CASE

RHA adopts the statement of the case set forth in Nyman's responsive brief.

D. ARGUMENT

(1) Washington Courts Strongly Disfavor Federal Preemption, Especially Where Unlawful Detainer Actions and Public Health Orders Are Among the Police Powers Reserved for the States

The CDC Order does not apply by its own terms to Nyman's action to repossess her property as a primary residence, especially because Washington issued its own eviction moratorium that provides at least the same amount of protection as the CDC Order. But looking beyond this plain language, the Court should decline Hanley's request to interpret the CDC Order as applying to *all eviction actions, nationwide,* regardless of their purpose and regardless of local moratoriums like the one in Washington. *See* appellant's br. at 20-23. This is essentially a preemption

analysis, where Washington courts strongly presume that state law controls.

Federal preemption occurs in two ways: field preemption or conflict preemption. *Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823 (1992). "If Congress indicates an intent to occupy a given field (explicitly or impliedly), any state law falling within that field is preempted; even if Congress has not indicated an intent to occupy a field, state law is still preempted to the extent it would actually conflict with federal law." *Id.*

As this Court has stated time and again, "there is a strong general presumption against finding that federal law has preempted state law. If federal law does not preempt state law, state law applies and [a court's] analysis ends." *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 622, 387 P.3d 1066 (2017) (citing, *e.g.*, *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 444-45, 327 P.3d 600 (2013)). Washington courts also recognize a "strong presumption against federal preemption when a state acts within its historic police powers."[1] *Hill v. Garda CL Nw., Inc.*, 198 Wn. App. 326, 343, 394 P.3d 390 (2017), *rev'd on other grounds*, 191

[1] Courts define "police powers" as "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (cited approvingly by *Decker v. Decker*, 52 Wn.2d 456, 465, 326 P.2d 332 (1958)).

Wn.2d 553 (2018), *cert. denied*, 139 S. Ct. 2667 (2019). "In order to find preemption, the courts have required an unambiguous congressional mandate." *Inlandboatmen's*, 119 Wn.2d at 702 (quotation omitted) (federal Coast Guard regulations did not preempt the State's ability to regulate ferry safety).

By its own terms, the CDC Order does not conflict with Washington's moratorium, nor is there anything close to an unambiguous federal mandate to occupy the field of landlord/tenant law. To the contrary, Washington's unlawful detainer statute, its control over eviction procedures in general, and its power to enact eviction moratoria to protect public health are among the classic police powers historically reserved for the states.[2] *See Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 982, 216 P.3d 374 (2009) (explaining that unlawful detainer actions are among a class of special statutory proceedings where the Washington Legislature has "exercised its police power" to govern the procedures and remedies available to property owners); *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233, 66 S. Ct. 69, 90 L. Ed. 34 (1945) (upholding a state

[2] As the United States Supreme Court reiterated in a recent opinion, "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. Nat'l Collegiate Athletic Ass'n*, __ U.S. __, 138 S. Ct. 1461, 1476, 200 L. Ed. 2d 854 (2018). The CDC simply does not have plenary authority to regulate state evictions where this power historically belongs to states.

moratorium on mortgage foreclosures as within "the reserve power of a State"); *State v. Superior Court for King County*, 103 Wash. 409, 419, 174 P. 973 (1918) ("[T]he preservation of the public health…is the first concern of the state") (upholding local quarantine ordinance to prevent spread of infectious disease).[3] This Court should avoid interpreting the CDC Order in a way that preempts the Washington moratorium, a valid exercise of the State's inherent power over property and public health.

Several federal circuit courts have already concluded that the CDC order infringes on these police powers historically reserved to the states. *Terkel v. Centers for Disease Control & Prevention*, __ F. Supp. 3d __, 2021 WL 742877 at *9 (E.D. Tex. Feb. 25, 2021); *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, __ F. Supp. 3d __, 2021 WL 911720 at *10 (N.D. Ohio Mar. 10, 2021). As Nyman properly observes, these courts recognized that possession of real property is an inherently local concern, and the federal government lacks authority over such matters. Resp't br. at 6-9. At the very least, whatever authority the federal government does have in this field, it does not preempt Washington's authority to issue and enforce moratoria on evictions like

[3] *See also, e.g., Ackerley Commc'ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980) (federal Highway Beautification Act did not preempt local law regulating highway billboards; local law aimed at promoting public safety was a valid exercise of police powers, and the federal law "acknowledge[d] the right of lesser governmental entities to enact regulations governing outdoor signs which are stricter than those imposed by the federal…act[]").

this one. This Court should avoid any reading to the contrary where courts strongly presume that state authority applies.

(2) If the Court Were to Adopt Hanley's Extreme Interpretation of the CDC Order, It Would Effectuate a Taking of Landlords' Property in Washington

This Court interprets statutes and other acts of government in a manner that avoids an unconstitutional effect. *E.g.*, *State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996). Were the Court to adopt Hanley's extreme interpretation of the CDC Order, it would amount to a taking of Washington landlords' property. In effect, the Court would allow renters to reside rent-free in landlords' properties, at the renters' choosing. Landlords could not sell or occupy their properties. The Court would transfer a vital property interest from landlords to tenants, and landlords would be effectively deprived of any real economic interest in their own properties.

(a) Moratoria Impact Landlords' Fifth and Fourteenth Amendment Rights

The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The clause prohibits "Government from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S. Ct. 2646, 57 L. Ed. 2d 631, *reh'g denied*, 439 U.S. 883 (1978). *See also, Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

Classically, a Fifth Amendment taking occurs: (1) where the government requires the owner to suffer a permanent physical invasion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982);[4] or (2) where a regulation completely deprives an owner of all economically beneficial use of the property, *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). As for the latter form of taking, where an onerous regulation "goes too far," a taking is present because it is the functional equivalent of a direct appropriation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

After *Penn Central* and *Lingle*, an ordinance goes "too far" where the economic impact of the regulation on the property owner is onerous, the regulation has interfered with the property owner's distinct investment-backed expectations, and the character of the governmental

[4] *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (USDA mandated that raisin growers set aside a portion of their crop as a reserve without paying growers; that reserve was a clear physical taking of personal property).

action is such that it amounts to a physical invasion of the owner's property. A more frequently applied iteration of this last factor considers whether the challenged regulation places a high burden on a few private property owners that should more fairly be apportioned more broadly among the tax base.

Hanley's interpretation of the CDC Order would not only deprive a property owner of rents, but prohibits that owner's occupancy or sale of their property. That would meet the *Penn Central/Lingle* test because such moratoria would deprive landlords of the essential economic value of their property. They could not receive rents, they could not occupy their property, nor could they sell it. The government's taking would be complete.

The landlords' investment-backed expectations reflected a basic understanding–the landlords bought their properties expecting that they would receive rent from tenants. That expectation was reasonable. Landlords, particularly small landlords, also believed they could occupy the premises or sell them if necessary. That expectation was disrupted by an extreme interpretation of the moratoria.

As for the third *Penn Central* factor, the character of the government action, while a court could consider the ostensible purpose of the moratoria – the effect of the COVID pandemic – a court need only

look to the bottom line: a government cannot impose the burdens of a societal policy upon a select few.

An extreme interpretation of moratoria places the economic burden of the COVID pandemic solely on the shoulders of landlords. This violates one of the primary policy concerns animating takings jurisprudence: the notion that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960); *see also, Lingle*, 544 U.S. at 537 ("Government [cannot force] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Singling out a small class to bear a societal burden "is the kind of expense-shifting to a few persons that amounts to a taking." *Cienega Gardens v. United States,* 331 F.3d 1319, 1338-39 (Fed. Cir. 2003).

This case is not like those addressing limited restrictions on a landlord's rental rights. *E.g.*, *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019), *cert denied*, 140 S. Ct. 2675 (2020) (no regulatory taking because a first in time ordinance was not the equivalent of a physical

appropriation of the property);[5] *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (addressing a municipal rent control ordinance).[6] In each of those cases, the landlord's right to rent her/his property was fully preserved. Nothing in those cases impaired a landlord's right to re-occupy or alienate her/his property at their discretion.

Weighing all of the *Penn Central/Lingle* factors together, an extreme interpretation of the CDC Order will cause substantial economic hardship to landlords and interfere with their investment-backed expectation of renting the property for a profit, selling the property if that is desirable, or even occupying the property. The moratoria single landlords out and force them to bear a burden that should fairly be borne by society as a whole. RHA is sympathetic to the concern of providing safe housing during a pandemic, and believes there are numerous constitutional alternatives to aid tenants, but the pandemic's impact is a *public* concern that the Legislature cannot abdicate to private landowners.

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[5] The *Yim* court adopted the federal takings test: (1) The government must require the property owner to suffer a permanent physical invasion of the property; or (2) The regulation at issue deprives the owner of all economically beneficial use of the property. 194 Wn.2d at 672.

[6] The United State Supreme Court there held that no physical taking occurred precisely because the landlords could rent their mobile home park properties, and could evict tenants, albeit after appropriate notice. 503 U.S. at 527-28. Unlike here, nothing forced the landlords to continue renting their property.

Hanley's interpretation of the CDC Order would "go too far" and amount to a regulatory taking under the Fifth and Fourteenth Amendments.

(b) The Moratoria Violate Article I, § 16 of the Washington Constitution

The Washington Constitution, article I, § 16 also prohibits a government from taking property from a private owner by excessive regulatory action without paying just compensation, but it is more protective of property rights than the Fifth Amendment; it prohibits the damaging of private property and bans the taking of private property by government for use by other private groups when it states: "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made[.]"[7]

Apart from our Constitution's unique treatment of takings noted above, in *Yim*, *supra*, this Court adopted the federal definition of regulatory taking from *Lingle*. A regulatory taking may be present *per se* if a property owner's property is physically invaded or the owner is deprived of all economically beneficial use of their property. Otherwise,

[7] In prohibiting takings for private use, the Washington Constitution has historically prohibited the type of action permitted under the Fifth Amendment in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, *reh'g denied*, 545 U.S. 1158 (2005). For example, where the City of Seattle tried to exercise its eminent domain authority to take private property for a mixed use, public and private, development, that was not allowed under article I, § 16. *Petition of City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981) (mixture of public and private uses in a project not permissible).

the *Penn Central* factors must be evaluated. *Id.* at 660-61. Our Constitution is implicated by the Hanley's argument for an extreme interpretation of the CDC Order. First, government cannot take landlords' property for the benefit of their tenants. Article I, § 16 establishes a *complete restriction* against taking private property for private use.[8] After *Yim*, although the definition of a regulatory taking now follows the federal model, 194 Wn.2d at 672, the more restrictive aspect of Washington's Constitution on takings for the benefit of private users remains in place. *Id*. at 667-68.

Here, Hanley's extreme interpretation of the CDC Order would deprive landlords of the right to use and rent their property as they choose and effectively conferred control of that right upon the tenants.[9] Landlords cannot dispose of their property as they choose. The tenants receive a right to rent-free tenancies, at landlords' expense, and deprive landlords of the right to occupy their own premises or sell them.

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[8] This Court held that the remedy for an article I, § 16 taking is not just compensation, but invalidation of the offending enactment. *Yim*, 194 Wn.2d at 660.

[9] Hanley's interpretation of the CDC Order would result in the transfer of value from the landlords to tenants. The government receives the transfer of such value and, in turn, provides it to the tenants who deprive the right to reside rent-free. This wealth transfer from landlords to tenants is a naked transfer distributing the resources to one group rather than another solely because those favored have exercised political power to obtain what they want. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1693, 1724 (1984).

Moreover, under the federal regulatory takings test, Hanley's interpretation of the CDC Order is tantamount to a physical invasion. The government would effectively dictate property rights of landlords. Similarly, landlords would be deprived of any viable economic use of their property.

Hanley's interpretation of the moratoria is *more intrusive* on landlord property rights than any Washington reported case. Landlords literally have no rights left – they cannot receive rent for the property, they cannot occupy it, they cannot sell it, according to Hanley. Any significant property rights are now *the tenant's* alone. And yet, the landlord still must pay the mortgage and property taxes on the property! Such a view would be an unconstitutional taking under article I, § 16 and must be invalidated.

In sum, this Court should avoid an interpretation of the rent moratoria here that would effectuate a taking under federal and state constitutional principles.

E. CONCLUSION

Neither the CDC Order nor the Washington moratorium preclude the unlawful detainer action that took place here because Nyman sought to repossess her property for a reason other than nonpayment of rent. For the reasons stated above, the Court should avoid relying upon an expansive interpretation of the CDC Order. That Order does not preempt this State's

inherent authority to regulate actions to repossess property, part of its historical police powers. And the Court should avoid the extreme interpretation of the moratoria Hanley champions, which would amount to an unconstitutional taking of private property.

DATED this 29th day of March, 2021.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for *Amicus Curiae*
Rental Housing Association of Washington

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Amicus Curiae Rental Housing Association of Washington*** in Supreme Court Cause No. 99249-5 to the following parties:

Edmund Winter
Kaitlin Heinen
Yuan Ting
Vallen Solomon
King County Bar Association
1200 Fifth Avenue, Suite 700
Seattle, WA 98101

Evan L. Loeffler
Loeffler Law Group PLLC
2611 NE 113th Street, Suite 300
Seattle, WA 98125

Andrew P. Mazzeo
Harbor Appeals and Law, PLLC
2401 Bristol Ct. SW. Suite C102
Olympia, WA 98502

Original E-Filed with:
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 29, 2021, at Seattle, Washington.

/s/ Frankie Wylde
Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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- yuant@kcba.org

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Sender Name: Frankie Wylde - Email: assistant@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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Third Floor Ste C
Seattle, WA, 98126
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